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ABSTRACT

Grievance arbitration is utilized on a nearly universal basis, but the process is malfunctioning in several ways. The study was based on a review of the literature, in field interviews, and in-depth correspondence with knowledgeable management and union practitioners; findings are limited to the arbitration step in contract administration. Twenty points of indictment of grievance arbitration and arbitrators were compiled and specific remedies were suggested, with a consensus being reached on some points and substantial disagreement ensuing from other points. Consensus included: desirability of shorter opinions stressing reasoning behind awards; urging arbitrators to take firm charge of hearings; charging of a reasonable fee if hearing is cancelled; a shortage exists of competent and experienced arbitrators; scepticism regarding the utility of submission arguments; and negative attitudes on some proposed reforms. Pre-arbitration suggestions include: that arbitrators receive pertinent information in advance, and that unreasonable delay in scheduling defeats one of the fundamental purposes of grievance arbitration. Greater arbitrator initiative, additional practitioner contributions to improving the process, and joint efforts by practitioners, arbitrators, and designating agencies toward continued improvement of the grievance arbitration process are recommended. A list of practitioner rights of expectation from the arbitrator is presented. (SC)

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Working Paper 1973-07

IMPROVING GRIEVANCE ARBITRATION: THE PRACTITIONERS SPEAK

by

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Improving Grievance Arbitration:

The Practitioners Speak

by

Harold W. Davey*

The Arbitration Dilemma

Arbitration is written into most collective labor agreements as the last step in the contractual grievance machinery. About 94 percent of all private sector contracts covering 1,000 or more employees so provide. The public sector labor relations movement has strengthened the private sector in endorsement of arbitration as a peaceful final step for determination of disputes over interpretation or application of ongoing contracts that the parties have been unable to resolve between themselves.[1/]

The U. S. Supreme Court has praised arbitration as a process (and arbitrators as knowledgeable professionals) since Lincoln Mills[2/] and the Warrior Trilogy,[3/] although some state courts are visibly not as sanguine about arbitrators as the highest court in our land.[4/]

The process is conceded, however, to be working poorly in many employer-union relationships. There is discouraging evidence that, in many instances, grievance arbitration is not living up to its press notices. Some of arbitration's best friends are among its severest critics.[5/] Some critical comment comes from uninformed, biased sources.[6/]

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We are concerned here solely with good faith, informed criticism from knowledgeable practitioners who are worried friends of the grievance arbitration process.

The crux of our dilemma is that grievance arbitration is utilized on a nearly universal basis, but the process is malfunctioning in several ways. This is a source of concern to all who participate in the process, whether as management or union practitioners or as arbitrators. In more homely language, grievance arbitration may be a poor thing, but it is our own. It may be the "worst" procedure for achieving final and peaceful resolution of disputes under ongoing contracts, but it is still better than any known alternative. Certainly, a return to the barricades of economic force is not an acceptable answer.

The present study is based in part on field interviews, but mainly upon in-depth correspondence with knowledgeable management and union practitioners. The study is strictly empirical and pragmatic. The sole objective is to report specific suggestions on how to improve grievance arbitration as a process. Although the writer is an arbitrator, we are here concerned primarily with the practitioner critiques and suggestions.

The findings are limited to the arbitration step in contract administration. It should be stressed, however, that many shortcomings of arbitration are directly traceable to "human error" and faulty procedures at earlier stages in the grievance machinery. Many cases should never reach arbitration. They get there because management and/or union representatives goofed in some fashion (either by actions or non-actions) at an earlier stage. Some person(s) lacked the guts, imagination or initiative to take self-correcting measures before it was too late. Pre-arbitration shortcomings are generally known to the "guilty," if not to the arbitrator. The route to more effective grievance procedures is treated here only inferentially.[7/]

I shall review first the research methodology involved and then summarize the various counts in the indictment. Most of the paper will be concerned with feasible proposals from practitioners for improving performance--by arbitrators and practitioners alike.

Research Method

The evidence supporting this article was collected in the following manner: 1) review of literature by practitioners and arbitrators on the basic problem area; 2) informal interviews with a considerable number of practitioners on both sides of the collective bargaining table since 1967; 3) specific written responses to the writer from approximately 26 management practitioners and 15 union practitioners in 1971 and 1972.[8]

The third source consists of detailed responses to a lengthy letter from the writer in April, 1971, referring back to and enclosing a reprint of a February, 1969 article in the Iowa Law Review.[9] This 1969 article in its turn was based on field interviews with practitioners in 1967-68, plus ideas that then appeared to me to be feasible. Candor requires the admission that many of my 1969 ideas were shot down by my 1971-72 correspondents. The shooting down was so effective that some of my original ideas have been abandoned.

Other research projects have intervened since April, 1971, but the practitioner correspondence file remains intact. It is gratifying to note that most ideas supplied in correspondence and interviews between 1967 and 1973 have in fact become increasingly urgent, meritorious, and pertinent. The march of time has served to highlight the wisdom of many suggestions.

Grievance arbitration as a process is probably in greater trouble than it was in 1967. It is encouraging to note, however, that some ideas, novel when first suggested, are currently operational in some employer-union relationships--e.g., expedited arbitration.

In nearly every case, the practitioner correspondents and/or interviewees are known to me personally. They do not constitute what purists regard as a scientifically selected sample. This "unorthodox" approach is advantageous for at least three reasons: 1) all correspondents and interviewees were knowledgeable and cooperative; 2) "knowledgeability" contributed to saving an enormous amount of time;

3) personal acquaintanceship, combined with the obligatory promise of confidentiality and anonymity, assured candor by the respondents.

This methodology precludes quantification. I do not regard this as detrimental. The scientific reliability of this study rests on the professionalism and detachment of the practitioners involved. The "inputs" I might have received from a questionnaire approach, using a scientifically-drawn sample, could have been "quantifiable." The findings from this "unstructured" study will prove of greater value to my fellow arbitrators and practitioners, in my best judgment. The fashionable mode of quantification just did not seem to fit.

Summary Indictment of Practitioners

The multiple counts in the ensuing indictment are not endorsed by all the practitioners who helped in this study. Further, remedial practices favored by some are opposed by others (e.g., the use of transcripts and/or post-hearing briefs). There is a higher degree of consensus on what's wrong with grievance arbitration than there is on what should be done about it.

Most criticisms will be familiar to the sophisticated reader. They are set forth seriatim with little or no comment. There is no special order of frequency or importance.

The practitioner indictment of grievance arbitration (and arbitrators) includes the following counts:

1) Excessive delay between the arbitration hearing and the ultimate decision by the arbitrator.

2) Protracted hearings, due to such factors as the inexperience of the arbitrator, admission of irrelevant testimony and exhibits, use of rhetoric instead of evidence, and the like.

3) Excessive costs of arbitration, both in terms of disproportionate use of practitioners time and arbitrators' study and writing time.[10/]

4) Too much "formalism" or "legalism" in the presentation and hearing of arbitration cases.[11/]

5) The length of arbitrators' opinions and their lack of clarity for the average managerial or bargaining unit employee.

6) Persistence of the custom of starting ad hoc hearings with arbitrators completely in the dark as to what the cases are all about.

7) Reluctance to experiment with ways of shortening hearings and arbitrators' decisions, without sacrificing due process rights or clarity.

8) Arbitration of trivial or routine issues (the "day in court" syndrome).

9) Inept conduct of hearings by arbitrators, either by being overly permissive or too domineering, demanding, or restrictive on case presentation.

10) Short supply of competent, experienced and acceptable arbitrators, coincident with a general reluctance to use new faces.[12/]

11) Practitioner insistence in many instances on transcripts, taped hearings, and/or post-hearing briefs--even on routine cases.

12) Arbitrator insistence on the availability of a hearing transcript and/or post-hearing briefs.

13) Inadequacies in practitioner presentation of cases before arbitrators (usually related to insufficient prior investigation or knowledge of the case at hand).

14) Deficient contract language as to the proper function of arbitration and the arbitrator's authority and jurisdiction.[13/]

15) Flaws in the arbitrator selection process, such as incomplete checking out of new and available arbitrators.[14/]

16) Reliance in some relationships on the tripartite board device in grievance arbitration, notwithstanding its cumbersomeness, cost, and disutility in most cases.[15]

17) Chronic tendency of many arbitrators to overcommit themselves so that they cannot offer hearing dates and decide cases within reasonable time constraints.[16]

18) A parallel practitioner tendency to develop backlogs so that they are unable to confirm an early hearing date when the arbitrator offers one.[17]

19) Persistence of arbitration folklore that involves excessive reliance on witnesses instead of greater use of fact stipulations, joint exhibits and the like.

20) Pervasive unwillingness to engage in candid self-appraisal by practitioners and arbitrators alike (the "we've always done it this way" syndrome). The net result is continued usage of wasteful, uneconomical procedures that produce understandable employee resentment and frustration at increasing delays and rising costs.

No particular magic attaches to the 20-count indictment. It could easily have run to forty counts or been reduced to ten through a telescoped approach. No matter what the number of counts, we have fleshed out a picture of a process in deep trouble. The need for reforming and revitalizing the process in many bargaining relationships is urgent to informed users and observers.

A greater sense of urgency is posed by the sharp increase in demand for arbitrators' services in the public sector--not only as grievance arbitrators but as fact-finders, mediators, future terms arbitrators, and resource experts at the negotiation level of collective bargaining.[18]

These new demands for professional neutrals in the public sector are taking place when there is also an expanded demand in the private sector as well. If

necessity is truly the mother of invention, we must meet the challenge to become innovative, productive, and even daring wherever necessary.[19] If we fail to do so, a process of proven value in effective contract administration may succumb to the malignant disease of over-institutionalization. There is at the same time the need not to bask in the warm glow of praise for past accomplishments. Many such tributes were exaggerated in the first instance.[20] None is especially valid under contemporary conditions, with perhaps a few exceptions.

The Practitioners' Remedies for the Ills of Grievance Arbitration

Two caveats are essential before we consider specific remedies offered by the practitioners: 1) although there is a remarkable consensus that something is seriously wrong with grievance arbitration, there is sharp disagreement over proposed cures; 2) many interviewees and correspondents agree that Solution X is "sound in theory," but, generally speaking, the respondents adopt a "let George do it first" posture when a novel or unusual procedure is under consideration. This frame of mind is discouraging but understandable when one remembers how certain practices and procedures have been S. O. P. in many bargaining relationships for many years.

Consensus Areas Summarized

Areas of substantial consensus reflected in interviews and correspondence include the following:

1) desirability of much shorter opinions by arbitrators, stressing the reasoning behind awards while eliminating window-dressing and dicta.

2) urging arbitrators to take firm charge of the hearing in the interests of expedition and elimination of irrelevancies and rhetoric.

3) agreement on the propriety of the arbitrator's charging a reasonable administrative fee in cases of untimely notice of hearing cancellations.

4) general agreement that there is a serious shortage of competent, experienced and acceptable arbitrators--a finding that conflicts with the McDermott Committee's 1973 report.[21] There is agreement also that "something should be done" to increase the supply, but no true consensus as to how to go about it.

5) across-the-board scepticism prevails on the utility of submission agreements. Most correspondents favor the theory while at the same time holding that the time and effort expended on seeking to reach submission agreements were counterproductive. These views should be of interest to both AAA and FMCS who still believe apparently that submission agreements are of value and worth fighting for.[22]

6) generally bearish attitudes on such proposed reforms as instant or expedited arbitration, bench rulings, and awards without opinions. It must be noted that my sample included only two practitioners who use either instant or expedited arbitration. Few respondents have requested either bench rulings or awards without opinions. As noted above, there is general agreement on the value of shorter opinions. Nearly all correspondents and interviewees desire lucid statements of the arbitrator's reasoning in support of his award--and not much else.

Disagreement Areas Summarized

Areas of substantial disagreement include the following:

1) A clean split over the desirability of eliminating verbatim transcripts and/or post-hearing briefs. Union correspondents were generally favorable to the idea. Management practitioners, in general, were completely or qualifiedly in opposition.

2) An absence of consensus as to whether "brinkmanship" can (or should) be eliminated. Many correspondents agree that settling cases on the

courthouse steps is theoretically poor practice. They urge, however, that the right to withdraw or settle a grievance at any time prior to (or even during) an arbitration hearing must be preserved.

3) General scepticism is evident as to the practicality of "dry-run" arbitration, as proposed by the writer in 1969. Some correspondents held the idea to be excellent in theory, but unworkable in terms of labor relations realities. It is significant, however, that some of the same correspondents who took a dim view of formal dry-run procedures reported practices that approximated this process. For example, one management correspondent endorsed a "Step 4 1/2," involving complete pre-hearing disclosure meetings by the two top representatives. This frequently resulted in cases being resolved without the need for arbitration.[23/] Another approximation of the dry-run occurs in many "board of adjustment" set-ups. The "partisan" members of an arbitration board meet for full, frank discussion that often eliminates the need to call in an outside neutral for final and binding decision.[24/] It is evident, however, that joint dry-run approaches are not feasible in most ad hoc arbitration arrangements.

Practitioner Suggestions for Procedural Reform

This paper is not intended to be a statistical survey. There are no tables. The sample is too small--even by my flexible, impressionistic standards. Thus, summary statements of areas of agreement and disagreement tend to obscure

(the next page is no. 10)

the heart of the matter which abides in useful, provocative, bona fides comments of individual respondents. Respecting the guarantee of anonymity, this section can best be described as an organized potpourri, taken from the correspondence itself. Direct quotations carry only an identification consisting of (M) for management practitioner and (U) for union practitioner. Many specifics in this section will not strike the sophisticated arbitration practitioner as particularly novel. Such a practitioner may already be utilizing the recommended procedures. If true, so much the better. Thus, the moral of this section can be stated as follows: "If the new shoe fits, wear it in good health." For those who do not need new shoes, the charge should be to spread the procedural reform gospel.

The individual comments are divided among three comprehensive headings: 1) pre-arbitration improvements; 2) hearing practices; 3) post-hearing reforms. In concluding remarks I shall deal with the ways in which my correspondents have coped with the short supply of competent, experienced and acceptable arbitrators--a matter of continuing concern to many of my practitioner correspondents and interviewees as well as to myself.

Pre-arbitration Procedural Suggestions

The main thrust of this article is on procedural improvements. It is critically important, however, to remember what one correspondent (M) has stressed that persons are more important than procedures. The validity of this trehchant observation is underlined, both directly and inferentially, in the responses of most practitioners.

For example, the folklore suggests that thorough investigation of grievances and careful pre-arbitration preparation of cases will: 1) wash out a great many cases via withdrawal or adjustment; 2) cases in arbitration will be presented more logically and economically because of sound homework.

Whether folklore becomes reality depends on the talent and tenacity of personnel involved in the pre-arbitration stages. If the management representative insists on complete, candid investigation and preparation, many contractually meritorious grievances will in fact be adjusted without arbitration. If the union international representative or counsel in the same spot has the wisdom, the courage and the power to drop cases that lack contractual merit, much time, expense and grief will be saved for all concerned.

The sober reality is that in many employer-union relationships--even some that are regarded as "sophisticated"--the folklore continues to be folklore because the individuals in charge on both sides lack the requisite courage, talent and tenacity to go by the book.

The writer wishes to note two major law firms, representing unions exclusively, who devote considerable time and energy to persuading their union clients not to arbitrate because their cases are contractually weak; that the arbitrations will be costly; and that they will probably lose. This is the way the process should work. All too often, however, the stance of the union counsel or international representative appears to be "let's take a chance and fight 'em on the beaches."

Management attorneys or labor relations directors also often take the courageous, sound position that contractually strong grievances should be adjusted short of arbitration. Once again, however, many allow the weak cases to run their course, depending on the arbitrator to detect contractual chinks in management's armor.

Such considerations call to mind the ambivalent or negative attitudes on the wisdom and practicality of dry-run arbitration. Many correspondents rejected this procedure, but their letters revealed that they do engage in an equivalent operation under some other name. For example, Robert A. Levitt endorsed

the "Step 4 1/2" concept on the back of [illegible]. The U.S. is currently engaged in an [illegible] construction [illegible] in the Persian Gulf where [illegible] chief spokesman for the position is an official in charge of [illegible]. I have inferential proof that [illegible] Levitz's Step 4 1/2 [illegible] I can recall having sat hearing before for a considerable number of years involving Western Electric and various unions over a period of years, how many of these actually came to arbitration.

Another "equivalency" of the new procedures are suggested by unions and respondents who urge that both parties set forth in some detail their position as to the relevant facts and contentions prior to the arbitration hearing step, with the joint understanding that each party can supplement as it deems to join the issue if the case does go arbitrarily to arbitration. In [illegible] it, such a procedure resembles pre-trial discovery methods used in our court system. It would appear, however, that in the pre-arbitration area we have generally fallen behind the courts. The conventional wisdom widely promoted is that *ad hoc* arbitrators should begin hearings first grievant sees in all but rare instances.

These considerations require comment on pre-hearing briefs, opening statements and the comparative responsibilities of the parties' spokesmen and the arbitrators in this area. This new world will be [illegible] merely negative--on submission agreements, stipulated issues, [illegible] and the like.

First, pre-hearing briefs or pre-hearing statements when [illegible] are generally regarded by the practitioners as unwise in theory but not in practice for several reasons. One possible flaw is that only one party would follow through, thus exposing his case to the party who adopted a "wait and see" strategy. The conscientious party would then deem it necessary to file a post-hearing brief as well, thus making the proceeding more costly than [illegible]

Many union correspondents were "turned off" by the terminology "pre-hearing brief," pleading lack of time to prepare such documents. These views reflect a theme, running through nearly all responses from both management and union, that any suggestion that "puts more work on the pros" (U) will not work. One management correspondent was especially caustic in criticizing the view that management practitioners have time to burn whereas union representatives were overworked and spread too thin. His experience caused him to conclude that I had been seduced by more "folklore" that was simply not true. This management spokesman was convinced that union representatives were as well or better prepared than their management counterparts. He deplored the implication that management personnel were sitting on their hands.

This individual response was not paranoid. It was a bona fides comment based on the correspondent's personal experience. It should be noted, however, that this correspondent was writing mainly in terms of experience with a permanent arbitrator system where both sides were well-prepared. In ad hoc arbitration, my experience has been that, generally speaking, management representatives have had more time for careful preparation than their union counterparts. All too often the union's arbitration spokesman learns about the case the night before (or even the morning of) the actual hearing. Under such conditions, the union representative has little choice other than to go forward and "make do" with what he has at his disposal. He is dependent on his wits and on the nature and quality of the evidence made available to him for presentation by the local union's shop committee.

The correspondence and interviews that comprise the "hard evidence" for this article, supplemented by the writer's ad hoc arbitration background, strongly suggest that starting the hearing with something more than a tabula rasa on the arbitrator's part can be accomplished in several ways. None of these would pile "more work" on the professionals. I note the following:

1) The arbitrator when making hearing arrangements can request that the parties supply one to two weeks in advance of the hearing such information as: a) a copy of the contract; b) copies of the written steps in the grievance procedure on Case X; c) brief written statements of what each party intends to show at the hearing. The underlined language avoids the scare term "pre-hearing brief" yet serves to accomplish the purpose of giving the arbitrator some idea as to what the case is all about at the start of the hearing.

2) If for any reason the foregoing suggestions by the arbitrator are not complied with by one or both parties, the arbitrator can properly insist at the hearing that each party make a complete opening statement as to their respective versions of the pertinent facts, issue(s) and contentions. From these statements, a number of informal fact stipulations can usually be developed that will: a) eliminate the need to elicit undisputed facts via testimony; b) inform the arbitrator at the outset so that he or she is capable of ruling on whether subsequent testimony and exhibits are relevant to the central contractual issue(s); c) inform the parties themselves of what they must contend with and what they do not need to meet by testimony or by argument; d) eliminate time-consuming argumentation over testimony or evidence alleged to be of a "surprise" character.

3) Using procedures outlined in either (1) or (2) supra should minimize the number of cases where transcripts and/or post-hearing briefs will be essential. Also, the probable incidence of irrelevancies should be greatly reduced.

What about "submission agreements" and "issue stipulations"? Few correspondents were sanguine on the value of seeking submission agreements. It was noted that the time consumed in such efforts is not worth it and can be a factor in serving to widen rather than narrow disputed areas. One management practitioner put it bluntly in these words: "I have never understood the great

interest in submission agreements. Assuming that the contract is properly written, and calls for judicial arbitration ... there has never seemed to me to be any problem." This same correspondent also reports no difficulty in reaching agreement with his union counterparts on phrasing the issue in such terms as: "Did the employer violate the contract in the way set forth in the grievance?"

This writer concurs with the observation just quoted. For some time, I have not asked in advance for submission agreements. When I used to ask for them, I seldom received them. In those rare instances where submission agreements were received they did not advance the state of my knowledge materially. For similar reasons, I devote little time to seeking agreement on phrasing the arbitrable issue if the parties have not done so on their own. I will seek agreement on the issue at the start of the hearing and allow a reasonable amount of time for sparring back and forth. If this fails, however, I inform the parties that I will phrase the issue in these terms: "Under the contract, should Grievance No. 99 be sustained or denied?" (Emphasis added). This invariably quiets things down. We can then proceed with the direct cases of the parties. It will be noted that my phrasing is similar to that proposed by the management practitioner quoted above.

Brief comment is in order on selection of arbitrators and scheduling of hearings. Many practitioners candidly admit that they won't take chances on new faces. They are willing to wait months for the old hands. Others have developed a technique for "having their cake and eating it" by agreeing on a panel of five or more mutually acceptable arbitrators. They then write these names into their contract, scheduling cases by rotation in terms of current availability of panel members. This technique has certain advantages of the permanent arbitrator system with few of its presumed disadvantages. It also sidesteps neatly the need to pay an annual retainer (plus per diem charges)

to obtain priority rights to the services of Arbitrator X. Panel arbitrators are used in rotation. Those next in line are passed over when not readily available until one is found who can schedule promptly. The panel, however, is usually made up of face-card names who may well be individually and collectively in a chronic state of overcommitment. Thus, employers and unions who jointly desire prompt hearings may be no better off than those who use a single permanent arbitrator or take pot luck on ad hoc panels from AAA or FMCS.

Delays in scheduling are not always the arbitrator's fault. The writer can cite chapter and verse. So can most of his peers. I recall one particular instance of being selected on a case in August and asked to furnish available dates for the following January. Although busy at the time, I could not say I was booked solid for next January. A January date was in fact set and the hearing was held.

To my mind, this is arbitration ad absurdum. It is strongly reminiscent of the old-style procedures of the National Railroad Adjustment Board when referees were hearing on an appellate basis cases tried on "the property" from two to twelve years earlier. Fortunately, NRAB procedures are now "streamlined." Hearings are held on the property of the carrier, but scheduling speed is still not exactly blinding.

A more recent illustration involves offering parties dates in August, September and October in terms of a July selection as arbitrator. No early dates could be found that were jointly acceptable. The date ultimately set was December 12, 1973. Scheduling delays cannot thus always be laid on the doorstep of the arbitrator. Whenever employers and unions are in a caseload bind that requires them to ask arbitrators to schedule several months after their selection, the red flag signals are up that something is wrong with the relationship. Interviews with the writer's peers on scheduling problems show that the cited instances are by no means atypical.

Scheduling difficulties can be due to one or more of a combination of factors including, inter alia, the following:

1) employer intransigence on refusing to adjust meritorious grievances.

2) union insistence on appealing most grievances to the arbitration step.

3) practicing "brinkmanship" or "chicken" on some cases in an effort to use a firm hearing date as a club to produce a last-minute settlement.

4) a generally "sour" relationship that produces excessive grievances in geometric progression.

5) policy decisions by top management and/or union leadership that fail to encourage (or even permit) foremen and stewards to adjust grievances on the shop floor or at an early grievance step.

6) ineptness on the part of those engaged in contract administration on one or both sides.

This paper does not encompass analysis of these discouraging factors. They are responsible, however, for many of the arteriosclerotic aspects of grievance arbitration for which arbitrators are often blamed unfairly. This conclusion in no way alters the writer's abiding conviction, expressed fully elsewhere, that the worst sin among arbitrators is the sin of overcommitment.[26/]

Summary Conclusions on Pre-Arbitration Critique

Without chewing our meat twice, certain summary conclusions can be drawn as to improved performance in the pre-arbitration stages of the process. These include the following:

1) Practitioners can contribute to better hearings by informing the arbitrator in advance to some extent by sending him or her the applicable

contract, a meaningful final written management answer to the grievance and the written appeal therefrom, and brief written statements from the parties as to what they intend to show. The desirability of the equivalent of a "Step 4 1/2" effort also has considerable merit.

2) Arbitrators can properly insist that the parties furnish in advance the information outlined in (1) supra. There is no need to start each hearing from scratch unless by joint desire of the parties for special reasons.

3) Brinkmanship will probably go on in many relationships, but should be avoided whenever possible. Whenever last-minute settlements occur, the arbitrator should charge an administrative fee for untimely hearing cancellations.

4) Time spent on trying to draft submission agreements is probably wasted, but both parties should follow court procedures of pre-trial discovery. Neither party should go into arbitration without being aware of the other party's case-in-chief.

5) Delay in scheduling properly attaches to the parties in some relationships--in others, the fault lies with the overcommitted arbitrators. Whatever the cause, unreasonable hearing delays defeat one of the fundamental purposes of grievance arbitration. Justice delayed does not necessarily result in justice being denied, but delay is a justifiable cause of employee resentment and friction.

Parties who insist on experienced arbitrators must answer to their constituents for scheduling difficulties. They are also chargeable with not pulling their weight in providing OJT for new arbitrators. No amount of education, relevant experience and apparent capacity for judicial detachment can substitute for the real thing. This is true, even for the fortunate few who serve formal apprenticeships under an experienced permanent arbitrator. It is even more true for the would-be ad hoc arbitrator.

What's Wrong with Arbitration Hearings and What are the Remedies?

The arbitrators must take a beating in this section. Practitioners were generally tougher on the arbitrators than on themselves for deficiencies in the actual hearing process. This is as it should be. The simple reason is that the arbitrator from the moment of his or her selection or designation is in charge. The arbitrator remains in charge until the award's delivery to the parties renders him functus officio--a term that I understand to mean "mission accomplished--without further authority."[27/]

The chief practitioner complaint against arbitrators--including those arbitrators who have been around long enough to know better--is that the arbitrator may be in charge of the proceeding but does not take charge.

It is no excuse to utilize such moth-eaten rationalizations as the following:

1) each party should be allowed to present his case in the way that he sees fit.

2) Exhibits should be admitted for "whatever they may be worth" (even if they are obviously worth little or nothing).

3) Witnesses should be used to develop the record (rather than fact stipulations) because the hearing constitutes "good therapy".

4) Arbitrators should not "get into the act" in witness interrogation because they may unwittingly distract management and union spokesmen from their projected lines of examination.

5) Arbitrators should not interrogate because this would impair their judicial image of detachment.

6) Arbitrators are responsible solely for maintaining an orderly hearing--they do not have an affirmative obligation to "complete the record" by personal interrogation.

No candid arbitrator can claim that he or she has not resorted to one or more of these excuses for failing to take affirmative charge of a hearing on some occasions. Even more discouraging is the evidence in my files which shows that many experienced arbitrators play no participatory role in the hearing. Practitioners who were critical of arbitrator hearing conduct were concerned mainly with sins of omission rather than commission. Disappointment was expressed at arbitrators who remained silent throughout the proceeding and who refused to rule out lines of testimony or exhibits--let alone argument--that were clearly not germane to the issue being arbitrated. These criticisms are valid. A stone face and stony silence do not equate with judicial restraint and detachment. More than likely, they reflect fear, misunderstanding or a failure to appreciate the positive responsibilities of the arbitrator.

There is another side of the coin. Many criticisms were made of arbitrators who believed all the nice things Mr. Justice Douglas had to say in the Warrior Trilogy cases.[28/] One such group of arbitrators consists of what one management practitioner caustically termed the "license to do good" school. This breed of arbitrator is hard to deal with at a hearing. Neither party wishes to antagonize one who has the power to render a final and binding decision. At the same time, if an arbitrator appears to have little or no regard for the contractual constraints on his or her discretion, the parties must stress repeatedly the proper parameters of the case under the contract. How the contract should have been written is none of the arbitrator's business. This must be made clear in case presentation--when necessary. Enterprise[29/] may need to be dragged in by the heels to remind the "dispenser of justice" that the award must be drawn from the "essence of the agreement."

Many valid practitioner comments are omitted which pinpoint some of the more common faults of novice arbitrators. One case is so bizarre, however, that I cannot resist noting it. An "arbitrator" is said to have advised a management

spokesman during the course of a hearing that cross examination was not a proper procedure in arbitration. The writer hopes he never learns the identity of this particular arbitrator. It is difficult to imagine how such a grievously misinformed individual was ever selected to hear and decide any case.

Those of the "license to do good" school are seldom reticent in their conduct of hearings. One of the more serious practitioner hazards is the domineering arbitrator who is the counterpart of the stone-face type.

The domineering type may do any or all of the following:

1) Lecture the parties at great length during the hearing.

2) Interfere prematurely or excessively in the examination of witnesses.

3) Contribute gratuitous observations on the performance of those presenting the case.

4) Cut off the examination of a witness on the basis that the arbitrator's mind is so keen that he already has grasped the thrust of the interrogation.

5) Advise the parties that they should accelerate the pace of their presentation because he has a flight to catch.

6) Probe vigorously on his own into subject matter areas that minimal astuteness would indicate are not considered by the parties to be germane to the case.

These areas of practitioner criticism on arbitrator hearing performance suggest clearly what the parties have a right to expect from the arbitrator at any hearing.

Practitioner rights include the following:

1) The right to expect that the arbitrator will take charge of the hearing by maintaining order, proper decorum, and ruling firmly whenever any spokesman gets "out of line."

2) A right to expect that the arbitrator will respect contractual provisions covering arbitral authority and jurisdiction, e.g., on which issues are arbitrable and which are not.

3) A right to expect that the arbitrator will enforce upon the parties the obligation to present their cases in line with the issue(s) being presented for decision.

4) A right to expect that the arbitrator will not enforce his or her conception of how to present a case upon either party, other than to keep the record reasonably free from irrelevancies, speech-making and the like.

5) A right to expect that the arbitrator will not embarrass the parties either by requesting a transcript or insisting on post-hearing briefs.

6) A right to expect that the arbitrator will interrogate as necessary in the same manner that judges do.

7) A right to expect that the arbitrator who does not understand something about the case will admit this fact and request that the same ground be gone over again.

8) A right to expect that the arbitrator will not discuss the pending case at any time prior to, during, or subsequent to the hearing, unless upon a jointly agreed basis.

9) A right to expect that the arbitrator, through interrogation, will not seek to "make" one party's case in the process of seeking to assure a complete record for decisional purposes.

The list of practitioner rights of expectation could be expanded. Most arbitrators would subscribe to this bill of rights for practitioners. The experienced arbitrators respect the process. Such neutrals therefore seek, in their own fashion,

to devise ways to improve the process. The aim is not to praise the process, nor to bury it. The goal is improvement. There is no one best way to accomplish this goal. However, the guidelines for improvement are reasonably clear.

The burden does not rest solely on the shoulders of the arbitrator. Many interviewees and correspondents who helped on this research project did not go in much for critical introspection. For example, those who urged the necessity for transcripts and/or post-hearing briefs held them to be essential for more efficient hearings and an accurate decisional process. Some candidly stated that their compelling reason for transcripts and briefs was scepticism as to the arbitrator's note-taking capabilities.

For example, one management respondent holds that elimination of transcripts, briefs and full opinions would "short-change" the parties. He continued, "If a case is important enough to take into arbitration we want that arbitrator to have a full picture of the situation and to have the parties' positions clearly set forth for the arbitrator and the opposing party. We want him to function as an arbitrator and not a note-taker--particularly where credibility is involved." (Emphasis added.)

The views of this practitioner are shared by many on the management side. There are also a considerable number who believe that "... transcripts are necessary in only a minority of instances."

A different stance, well worth thoughtful consideration, is represented in this statement by a management attorney: "... I would be in favor of eliminating court reporters and transcripts of proceedings only if post-hearing briefs are to be eliminated ... often we do not know what the real issues are and what the union's contentions will be until the time for the hearing ... a transcript enables us to digest this information and to clarify necessary points in a brief to the arbitrator." This respondent's statement favoring elimination is conditioned by an assumption--still contrary to fact in his situation--that

both parties have prepared their cases carefully in advance of the hearing and have narrowed the issues in order to expedite the hearing.

The split over the need for transcripts and/or briefs will continue. Decisions over whether transcripts and/or briefs are essential must be made by the parties--never by the arbitrator. Delays and costs are important variables, but they are not necessarily the decisive ones. I have often been grateful for both transcripts and briefs. I have also heard many cases where the transcript and brief were expendable luxuries. If both parties are well prepared in advance, if the arbitrator is experienced, and if the case at hand is not of unusual complexity, transcripts in my view are not essential. Please note the three if's, however. When a transcript is available, contractual arguments can be stated for the record at the completion of direct presentations. Again, the assumption must be made that the parties know what they are doing. This controversial perennial will be left with the French disclaimer, "chacun à son goût."

Improving Decisional Processes

In this section we shall review practitioner comments on the following:

1) shorter opinions.

2) awards first--opinions later.

3) bench decisions.

4) decisions without hearings.

5) instant or expedited arbitration.

6) citation of decisions from other bargaining relationships.

7) decisions by "hearing officers," reviewed by a "senior" arbitrator.

8) awards only.

Shorter opinions found the most favor among my interviewees and correspondents. However, approval was always qualified by the insistence upon the arbitrator's reasoning being set forth fully and unambiguously. Virtually no support could be found for an "awards only" method. All management and union practitioners have a strong desire to know why,--even though some candidly stated that they read the award page first.

Some practitioners indicated favorable attitudes toward an award-first, opinion-later method--especially in cases such as discharge or other issues where financial liability was running. This method has increasing appeal for the the writer in recent years. In the midst of a varied, hectic schedule one can block off sufficient time to study the record and reach a decision. However, when insufficient time is then available to write a regular opinion, the penchant to procrastinate frequently becomes overpowering. When an arbitrator knows at the end of a hearing that he will be in a subsequent time bind, it is appropriate to ask the parties whether they would be jointly amenable to issuance of the award at the earliest feasible time, with the understanding that the supporting opinion would be forthcoming at a later date.

The procedure involved in "decisions without hearings" has considerable unexplored potential, in my view. Several practitioner correspondents suggested utilization of this procedure. Some had tried it and liked it. Others had not tried it, but believed it was worthy of experimentation. My limited experience with this procedure has been satisfactory. Clearly, its use is limited to cases involving no dispute over the pertinent facts and an issue of straight contract interpretation. In such cases the non-hearing approach should be viable. It conserves the time of both the arbitrator and the parties. It reduces the expense of arbitration and should produce quicker decisions. In some situations, of course, one or both parties will prefer the physical presence of the arbitrator for its presumed therapeutic value.

Instant arbitration and expedited arbitration are distinctly different procedures, although they are frequently linked together in the same breath. Instant arbitration is useful in fields such as longshoring and the performing arts where the nature of the work may require on-the-spot decisions.[30/]

Expedited arbitration, as in the basic steel experiment, is designed to alleviate rank-and-file frustration over unreasonable delays caused by huge caseloads. In steel, new faces are being used for the expedited cases whereas the "biggies" continue to go through the regular permanent arbitrator mill. The experiment appears to be working.[31/] One should not quarrel with success. However, it would seem that the older hands would be more adept at handling hearings and decisions on an expedited time table than the new faces. What works in steel might not work as well elsewhere--partially for the reason just stated. There can be no doubt, however, that there is ample room for innovation and experimentation with instant or expedited procedures.

Few practitioner comments were received on the matter of citing decisions by other arbitrators in other bargaining relationships. I refer not only to extensive decision-citing in post-hearing briefs but also to the practice of some arbitrators in documenting (buttressing?) their opinions with decisions dug up by themselves. In my view, both practices are censurable--certainly, the latter. Each arbitration case is decided under a particular contract involving a particular employer and union. It is this contract alone from which the arbitrator draws his authority and jurisdiction. It is in the "essence" of this particular agreement that the arbitrator must ground his award. Decisions in the same bargaining relationship are relevant. Decisions from other relationships are, in my view, unnecessary and even undesirable window-dressing.

Judging from the character of many of the post-hearing briefs I receive, this viewpoint does not command widespread support. I do not object to occasional noting of some deathless prose by such departed giants of our profession

as Harry Shulman, Aaron Horvitz and Saul Wallen--or even some current giants. Nevertheless, however pertinent and mellifluous such prose may be, the arbitrator is deciding a particular case under a particular contract on a particular record made at a particular place and time. It is this record on which the decision must be based.

Finally, it may be noted that the practice of citing outside decisions is not consistent with the preponderant view favoring shorter opinions and quicker decisions. I rest my case.

The New Faces Problem

Use of new faces as hearing officers, supervised in absentia by experienced arbitrators, is the final device to consider under the rubric of improving the efficiency of grievance arbitration. This idea has been kicking around for many years. It has been used to some extent in ad hoc situations where the parties have confidence in the "senior person" who vouches for the capabilities of the proposed hearing officer.

Generally speaking, the hearing officer approach did not arouse any notable enthusiasm among my union and management respondents. I have proposed this procedure--so far without success. What I have been able to do in a few instances is to withdraw as selectee, strongly recommending that the parties utilize the services of Arbitrator X, vouching personally for the new arbitrator's ability, integrity and sense of judicial detachment. Arbitrator X has now achieved a high degree of acceptability in his own right. He is selected with some regularity from FMCS panels. Thus, my experience suggests that recommending an available, qualified substitute works. The offer to "supervise" was never accepted. I do not know what this proves--if anything.

Fledgling arbitrators can be of great value in accelerating the scheduling process as "surrogates" for overcommitted senior arbitrators or as physical

presences at hearings (with their decisions to be reviewed prior to issuance by senior persons.) In ad hoc arbitration, this appears to be the best approach to insure prompt hearings and also to give invaluable OJT to the new face. It is not as satisfactory as the formal apprentice-type arrangements in the major umpire systems. Yet, in the huge wasteland of ad hoc arbitration, the potential in this procedure appears to have been explored inadequately up to the present time.

Closing the Decisional Time Gap

Many contracts provide that the arbitrator's decision must be rendered within thirty (30) days from the close of the hearing (or receipt of briefs). Some contracts are even more restrictive, making the due date fifteen (15) days. Research among fellow arbitrators and practitioners on both sides of the bargaining table shows a frightening gap between such contractual expressions and reality.

I know personally only one full-time arbitrator in the U.S.A. who manages to adhere to the thirty-day rule consistently. My interviewing shows that under contemporary demand conditions it is virtually impossible for the busy full-time arbitrator or the overcommitted moonlighter to live up to contractual deadlines in all cases. Many do not have the courtesy and prudence to request extended filing time, either at the close of the hearing or by subsequent correspondence. Others (the writer included) will write polite "Dear John" letters that request extensions of time varying in length from one month to several months. My interview files include several "horror stories" of decisions of other arbitrators for which the parties have been waiting for a year or more.

Such delays are intolerable, inexcusable and destructive of the process. New guidelines must be established by AAA, FMCS and the National Academy of

Arbitrators that will distinguish between reasonable, excused delays (serious illness, for example) and unreasonable decisional delays. Also, at some point, delay must be held to have passed beyond the category of bad practice into the dark area of "unethical conduct."[32/]

What suggestions do the practitioners have on the delay problem? The innovative answers are on the sparse side. The most common is a fairly general endorsement of shorter opinions, already discussed. Many arbitrators, the writer included, are seeking to do this. To be candid, however, it is nearly as time-consuming to write cogent, lucid short opinions as it is to write at greater length. This, at least, has been my experience. There are values in shorter opinions per se. They will not solve the delay problem in decision-making.

The basic problem is overcommitment. The arbitrator and the arbitrator's conscience must solve this one. Practitioners can help, however, by becoming less tolerant of decisional delays. Joint letters to Arbitrator X can complain about the long silence and request a time certain when they can expect a decision. Also worth considering is a jointly tailored plan for forfeiture of all or part of the arbitrator's fee when the decision is delayed without just cause. All arbitrators are familiar with the concept of corrective discipline. Why should not we subject ourselves to a similar procedure?

These are intentionally harsh suggestions, designed for serious delay problems. The best way to avoid such sanctions is for the arbitrators to engage in greater self-discipline. Whenever they realize they are in danger of taking on too many cases, the simple solution is to advise FMCS, AAA, NMB and regular private users that they are unavailable until further notice. Resisting the temptation to overcommit will have the ineluctable consequence of forcing employers and unions to utilize more new faces. It could even bring about the proliferation of rigorous training programs for prospective qualified neutrals in the private and the public sectors. Arbitration as a profession is unique

because there is no agreed-upon method of entry other than use. It is perhaps essential to develop a systematic approach to "certification," accompanied by some built-in guarantees of a decent amount of OJT thereafter.

The "customers" (employers and unions) are the principal victims of decisional delay. It is thus a bit surprising that greater ingenuity has not been shown by practitioners on how to increase the number and quality of professional neutrals. Excepting the major umpire systems with their developed apprenticeship programs, it is difficult (though not impossible) for the typical ad hoc arbitrator to "develop" new faces on an individualized, catch-as-catch-can basis. Training and "certification" of new faces must be done in the main through regularized institutional programs.[33/]

One of my respondents (M) summarized the acceptability problem bluntly in these words: "The most important roadblock to the use of a 'new' arbitrator is the absence of a record of neutrality and objectivity in labor cases ... Training or technical competence is not the real problem. Many ... are available who already have the training or technical competence. The ... solution of the problem is necessarily ... finding a substitute for the absence of a 'track record' which will be accepted as supplying substantially equal assurance of neutrality in labor cases. I do not know of any suitable substitute (for) the parties being willing to 'take a chance' on new arbitrators and enable them to establish a case record."

This quotation embodies the candid observations of most of the management and union practitioners in my survey who commented on the supply dilemma.

Conclusions

In summary fashion, in what specific ways has this practitioner survey increased our stock of knowledge on how to improve grievance arbitration? I think we can list the following:

1) Greater arbitrator initiative is critical to improving the process in terms of making reasonable demands for basic information in advance of the hearing; in assuming a more positive "take charge" stance in the conduct of hearings; and in avoiding delays in the decisional process by such means as awards preceding opinions, shorter opinions, avoidance of overcommitment, and rendering all possible aid in the training and introduction of new faces.

2) Practitioner contributions to improving the process can take such forms as: willingness to experiment with devices such as decisions without hearings; encouragement of shorter opinions; utilization of Step 4 1/2 or an equivalent mechanism to reduce case loads; joint censure of arbitrators for unreasonable delays, including the possibility of fee sanctions; more sparing utilization of transcripts and post-hearing briefs; avoidance of citation of decisions from other bargaining relationships; eliminating the practice of brinkmanship whenever possible to avoid the wasted time associated with untimely hearing cancellations; greater willingness to give new faces a chance or to accept the monitored hearing officer procedure; application of pressure on AAA and FMCS for more complete information on new faces, including names of references that caused the new faces to be included on panel rosters in the first instance; and greater professionalism, both in preparation and presentation of cases in the interest of more economical but complete hearings.

3) Joint efforts by the practitioners, the arbitrators and the designating agencies to encourage continuing research on how to improve the process of grievance arbitration. There must be a general commitment to be receptive to innovation, experimentation and change, as circumstances may warrant.

Footnotes

1/ It is reasonable to anticipate that grievance arbitration of "rights" issues under ongoing contracts will be nearly universal in public sector labor relations. In the private sector, the only major exceptions that come to mind are many collective agreements involving the International Brotherhood of Teamsters (IBT) which clings to the bi-partite board as the last step but still reserving the strike option. The IBT and many employers, however, have jointly agreed in specific cases to submit issues to final and binding decision by neutral arbitrators in the conventional manner.

2/ Textile Workers v. Lincoln Mills, 353 U.S. 448(1957) was a landmark decision, holding that agreements to arbitrate and arbitrators' awards are enforceable in Federal district courts under Section 301 of the National Labor Relations Act, as amended.

3/ The 1960 Trilogy decisions gave decisive support to Lincoln Mills, cited supra, fn. 2. More than that, Warrior in particular contained some "purple prose" by Mr. Justice Douglas praising not only the wisdom and sagacity of arbitrators, but also appearing to recognize a charter of arbitral authority far broader than that contemplated or desired by practitioners and arbitrators alike.

It is worth noting that many articles critical of Mr. Justice Douglas' rosy view of arbitral omniscience were written by arbitrators. The Trilogy citations are as follows: United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564(1960); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574(1960); and United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593(1960).

Among the many commentaries on the Trilogy I shall modestly note only my own. See Harold W. Davey, "The Supreme Court and Arbitration: The Musings of an Arbitrator," Vol. 26 Notre Dame Lawyer (March, 1961), pp. 138-145.

4/ See Thomas G. S. Christensen, "The Disguised Review of the Merits of Arbitration Awards," in Barbara D. Dennis and Gerald G. Somers, eds., Labor Arbitration at the Quarter-Century Mark, Washington, D.C.: The Bureau of National Affairs, Inc., 1973, pp. 99-114.

5/ A proper bibliographical footnote would dwarf the dimensions of this article. The reader should consult the cumulative index covering the first twenty-five years of published papers at National Academy of Arbitrators' annual meetings for numerous examples of arbitral self-criticism. See Labor Arbitration at the Quarter-Century Mark, cited fn. 4, supra, pp. 355-466. Many additional critiques can be found through a careful check of the Index to Legal Periodicals.

6/ The best-known diatribe is Paul R. Hays, Labor Arbitration: A Dissenting View. New Haven, Conn.: Yale University Press, 1966. Although an experienced arbitrator before going on the Federal bench, Judge Hays' analysis was generally held by reviewers to be both uninformed and biased. Principles of "fair comment," however, require citing his monograph.

7/ For more extensive treatment, see Harold W. Davey, Contemporary Collective Bargaining, 3rd ed., Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1972, pp. 141-156.

8/ This research in a sense is a sequel to a more intensive, thorough-going survey and analysis of practitioner criticisms conducted and reported on in 1964 by Dallas L. Jones and Russell A. Smith of the University of Michigan. See their excellent article, "Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments," Vol. 62, No. 7, Michigan Law Review (May, 1964), pp. 1115-1156. Comparison of my findings with those of Jones and Smith indicates that the melody of criticism remains basically the same, although there has been some variation in the lyrics over the years.

9/ Harold W. Davey, "Restructuring Grievance Arbitration Procedures: Some Modest Proposals," Vol. 54, No. 4, Iowa Law Review (February, 1969), pp. 560-578. This article represented the first published results of research initiated during a Faculty Improvement Leave grant from Iowa State University in 1967-68. The present article is the final product from the 1967-68 research leave. The reader is spared citation to intermediate products. However, I wish to express once again my appreciation to Iowa State University for the leave that triggered my research on how to improve the arbitration process and the performance of arbitrators.

10/ Both the American Arbitration Association (AAA) and the Federal Mediation and Conciliation Service (FMCS) have hard evidence to refute in convincing fashion the frequent charges that arbitrators' fees are a prime cause of increases in the costs of grievance arbitration. When compared with the increased rates of other professionals involved in the process, notably attorneys and court reporters, the per diem charges of arbitrators have not risen appreciably in the inflationary years since 1966.

On occasion, the increase in the arbitrator's bill is directly attributable to the nature of the presentation by employer and union--e.g., transcripts, post-hearing briefs, citation of numerous decisions, and the like. An unfortunate recent example that tends to perpetuate the "folklore" about arbitrators' fees is an article by Benjamin Rubinstein, "Some Thoughts About Arbitration Costs," Vol. 24, No. 6, Labor Law Journal (June, 1973), pp. 362-366.

11/ This is a slippery allegation. The catch phrases mean different things to different persons. Actually, a certain amount of "formalism" and "legalism" is essential to an economically-conducted arbitration case.

12/ The debate continues over whether there is a shortage of labor relations neutrals. There is clearly no shortage of would-be neutrals. The Institute of Industrial Relations of the University of California at Berkeley completed in 1973 an imaginative, one-year training program for seventeen (17) "new faces." The fortunate seventeen were selected from among 562 applicants. See Institute of Industrial Relations, New Faces, 1973. When one thinks in terms of the quality of supply, the picture becomes alarming. There is considerable evidence to support the hypothesis that a shortage still exists of competent, experienced and acceptable professional neutrals. This problem area is discussed more fully later in this paper. A training program similar to the on at Berkeley has also been completed at UCLA, directed by Howard Block and Paul Prasow.

13/ Many of my respondents stressed the critical importance of careful drafting of the contract's arbitration provisions. This is the quintessential first step in achieving the type of grievance arbitration desired.

14/ Many respondents candidly stated they do not select new faces. Others have done so and do not appear to have been "burned" often as a result of their "boldness." Rejecting new faces out of hand is not rational selection. I can think of several new faces that I would prefer to some old hands if I were a management or union practitioner.

15/ The writer has a bias against tripartite boards in grievance arbitration. However, their utility in future terms cases (arbitration of "interests" disputes) is beyond question. See Harold W. Davey, "The Uses and Misuses of Tripartite Boards in Grievance Arbitration," in Charles M. Rehmus, ed., Developments in American and Foreign Arbitration, Washington, D.C.: The Bureau of National Affairs, Inc., 1968, pp. 152-179.

16/ As I have stated elsewhere, the worst sin of busy arbitrators is the sin of overcommitment. See Harold W. Davey, "Situation Ethics and the Arbitrator's Role," in Proceedings, 26th Annual Meeting, National Academy of Arbitrators, Barbara D. Dennis and Gerald G. Somers, eds., to be published by The Bureau of National Affairs, Inc. in late 1973 or early 1974.

17/ Many arbitrators have had the experience of offering reasonably early hearing dates, only to be advised by the parties that the earliest date that they can make is several months away. This is unsound contract administration where the arbitrator is clearly not the villain.

18/ See Harold W. Davey, "Third Parties in Labor Relations--Negotiation, Mediation, Arbitration," to be published in May, 1974 by BNA Books, Inc. as a chapter in the American Society for Personnel Administration's official Handbook of Personnel and Industrial Relations. The paper is currently available as Working Paper No. 1973-04 of the Industrial Relations Center, Iowa State University, Ames, IA.

19/ Several municipalities are currently experimenting with the use of experienced arbitrators as "neutral advisers", a public sector effort in preventive mediation. This is an example of the kind of "daring" I have in mind.

20/ Many journal articles written about twenty years ago belonged to "the arbitrator can do no wrong" school. Such uncritical analysis belongs in the folklore category.

21/ The National Academy of Arbitrators' Committee on Development of New Arbitrators, chaired by Thomas J. McDermott, conducted a questionnaire survey of the entire NAA membership in early 1973 as to each member's 1972 caseload experience. The questionnaire response was about 57 percent. Many respondents admitted to full utilization or overcommitment. Many others reported that they could have handled more cases than they did in 1972. They regarded themselves as under-utilized. Geographical differences also played some role in the responses. The writer, a member of the McDermott Committee, dissents from the Committee's conclusion that there does not appear to be any severe shortage of qualified, experienced and acceptable arbitrators. I suspect that many who reported themselves as under-utilized were at least partially unacceptable--perhaps for good reason in some cases.

22/ To my knowledge, AAA continues to request submission agreements. FMCS requires arbitrators to report when filing their decisions as to whether submission agreements were received.

23/ See Robert A. Levitt, "Lawyers, Legalism and Labor Arbitration," Vol. 6, No. 4, New York Law Forum (October, 1960), pp. 379-399.

24/ This bi-partite board procedure works reasonably well, for example, in the airline industry and also in trucking, as noted earlier.

25/ See Robert A. Levitt, cited supra, fn. 23.

26/ See Harold W. Davey, cited supra, fn. 16.

27/ See Peter Seitz, "Problems of the Finality of Awards, or Functus Officio and All That," in Mark L. Kahn, ed., Labor Arbitration: Perspectives and Problems, Washington, D.C.: The Bureau of National Affairs, Inc., 1964, pp. 165-176.

28/ Warrior and its two companion cases are cited earlier at fn. 3.

29/ See supra, fn. 3.

30/ See Harold W. Davey, Contemporary Collective Bargaining, op. cit., pp. 187-188.

31/ For a preliminary generally optimistic appraisal, see Ben Fischer, "Arbitration: the Steel Industry Experiment," Vol. 95, Monthly Labor Review (November, 1972), pp. 7-10.

32/ The writer holds that six months after the closing of the record should constitute the dividing line between unreasonable delay and possibly unethical conduct on the arbitrator's part.

33/ The Berkeley "New Faces" program is an example of what I have in mind. See fn. 12, supra.